

Cathy Reynolds	At Large
Timothy "Tim" Sandos	At Large
William A. "Bill" Scheitler	District 1
T. J. "Ted" Hackworth	District 2
Ramona Martinez	District 3
Joyce Foster	District 4
Polly S. Flobeck	District 5
Mary DeGroot	District 6

CITY COUNCIL

City and County of Denver



David M. "Dave" Doering	District 7
Hiawatha Davis, Jr.	District 8
Deborah L. Ortega	District 9
Edward P. Thomas	District 10
Allegra "Happy" Haynes	District 11
John Bennett	Director
Ann Mlodzeniec	Assistant Director

ROOM 451 • CITY & COUNTY BUILDING
DENVER COLORADO • 80202
PHONE: (303) 640-3012
FAX: 640-2636

January 13, 1995

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

JAN 17 1995

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

The enclosed is submitted on behalf of the City and County of Denver, Colorado ("City") to be included as part of the Reply Comments sought by the Federal Communications Commission in its Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266. The City's Reply Comments pertain to preferential access for Public, Educational, and Governmental programmers to video dialtone system capacity.

The original and nine (9) copies are enclosed. Please contact me at the above address and telephone number if additional information is needed to properly evaluate the enclosed materials.

Sincerely,

Hiawatha Davis, Jr.
City Councilman and
Chair, Economic Development Committee

Enclosure

No. of Copies rec'd 089
List A B C D E

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

JAN 17 1995

In the Matter of)

TELEPHONE COMPANY-)
CABLE TELEVISION)
Cross-Ownership Rules,)
Sections 63.54-63.58)

and)

Amendments of Parts 32, 36,)
61, 64, and 69 of the)
Commission's Rules to)
Establish and Implement)
Regulatory Procedures for)
Video Dialtone Service)

CC Docket No. 87-266

DOCKET FILE COPY ORIGINAL

RM-8221

REPLY COMMENTS OF THE CITY AND COUNTY OF DENVER, COLORADO

Alonzo Matthews
Manager
General Services Administration

City and County of Denver
17th Floor
303 West Colfax
Denver, CO 80204

Deborah L. Ortega
President
City Council

Hiawatha Davis, Jr.
City Councilman and
Chair, Economic Development Committee

City and County of Denver
City and County Building
Denver, CO 80202

January 13, 1995

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. INTRODUCTION	1
II. DISCUSSION	4
A. The FCC Should Establish Preferential Access To Video Dialtone Systems For Public, Educational And Governmental (PEG) Programmers	4
B. PEG Access Should Be At No Charge To The Programmer	9
C. Specific PEG Access Capacity Should Be Negotiated At The Local Level	10
D. Preferential PEG Access To Video Dialtone System Capacity Is Sound Public Policy And Will Further The Public Interest	11
III. CONCLUSION	12

SUMMARY

The City and County of Denver, Colorado's ("City's") review of the record being developed through the Federal Communications Commission's ("FCC's" or "Commission's") Third Further Notice of Proposed Rulemaking in CC Docket No. 87-266 indicates that the City, other local governments, government organizations, community and consumer groups and members of the telecommunications industry all believe that the FCC should establish preferential access for Public, Educational and Governmental (PEG) programmers. This wide spectrum of commentors cite a variety of compelling reasons that such preferential access would be sound public policy and that such access is necessary to meet the Commission's public interest goal of providing the widest possible diversity of programming through video dialtone. These commentors also provide substantial evidence that such access must be at no cost or low cost if PEG programmers are to provide truly viable services on video dialtone systems. Further, while supporters of preferential access for PEG programmers may differ on the amount of capacity that should be allocated and the methodology for allocating such capacity, there is significant support that such issues should be addressed at the local level.

Conversely, some members of the cable and telecommunications industries are opposed to all or at least some forms of preferential access. These commentors' opposition appears to be rooted in their belief that preferential access would violate both bedrock common carrier principles and their First Amendment rights. A careful review of their Comments, however, indicates that their opposition is primarily targeted at preferential

access to video dialtone systems for commercial programmers such as commercial broadcast stations. After review of their Comments, the City believes that there is significant evidence to indicate that these commentors' objections on First Amendment and common carrier principle grounds are not valid when applied to preferential access for PEG programmers.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
TELEPHONE COMPANY-)	CC Docket No. 87-266
CABLE TELEVISION)	
Cross-Ownership Rules,)	
Sections 63.54-63.58)	
)	
and)	
)	
Amendments of Parts 32, 36,)	RM-8221
61, 64, and 69 of the)	
Commission's Rules to)	
Establish and Implement)	
Regulatory Procedures for)	
Video Dialtone Service)	

REPLY COMMENTS OF THE CITY AND COUNTY OF DENVER, COLORADO

I. INTRODUCTION

On December 16, 1994, the City and County of Denver, Colorado ("City") and a number of other respondents filed Comments with the Federal Communications Commission ("FCC" or "Commission") in its Third Further Notice of Proposed Rulemaking in CC Docket No. 87-266 in response to the Commission's request for comments on, among other issues, proposals to provide preferential access for certain classes of video programmers to video dialtone system capacity. A review of these Comments indicates that the City, other local governments, government organizations, community and consumer groups and members of the telecommunications industry all believe that the FCC should establish preferential access for Public, Educational and Governmental (PEG) programmers. In their Comments, they cite a variety of compelling reasons that such preferential access would be sound public policy and that such access is necessary to meet the Commission's public interest goal of

providing the widest possible diversity of programming through video dialtone. These commentors also provide substantial evidence that such access must be at no cost or low cost if PEG programmers are to provide truly viable services on video dialtone systems. Further, while supporters of preferential access for PEG programmers may differ on the amount of capacity that should be allocated and the methodology for allocating such capacity, there is significant support that such issues should be addressed at the local level.

Conversely, some members of the cable and telecommunications industries are opposed to all or at least some forms of preferential access. These commentors' opposition appears to be rooted in their belief that preferential access would violate both bedrock common carrier principles and their First Amendment rights. A careful review of their Comments, however, indicates that their opposition is primarily targeted at preferential access to video dialtone systems for commercial programmers such as commercial broadcast stations. After review of their Comments, the City believes that there is significant evidence to indicate that these commentors' objections on First Amendment and common carrier principle grounds are not valid when applied to preferential access for PEG programmers.

Based on its review, the City herein re-emphasizes the points made in its Comments dated December 16, 1994.¹ The City finds significant support for its views in, among others, the Comments of the National Association of Telecommunications Officers and Advisors and the City of New York ("NATOA, et al.")²; the Comments of the Alliance for

¹ See generally, Comments of the City and County of Denver, Colorado, in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

² See generally, Comments of the National Association of Telecommunications Officers and Advisors and the City of New York, in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

Communications Democracy; the City of Ann Arbor, Michigan; the City of Fort Worth, Texas; Montgomery County, Maryland; and Somerville Community Access Television ("ACD, et al.")³; and the Comments of the Alliance for Community Media and the Office of Communication of the United Church of Christ (collectively, the "PEG Access Coalition")⁴. The City also finds significant support for its views in the comments of a variety of telecommunications providers, including the Comments of Bell Atlantic⁵ and the Comments of the Pacific Telesis Group, Pacific Bell and Nevada Bell ("Pacific")⁶. The City, however, does differ from the views of some telephone industry supporters of preferential access concerning whether such access should be mandatory or voluntary. The City also takes issue with the comments of members of the cable and telecommunications industries that substantially oppose preferential PEG Access; most notably, comments on preferential access proposals filed by the National Cable Television Association, Inc. ("NCTA")⁷; Adelphia Communications Corp., Comcast Cable Communications, Inc., Cox Enterprises,

³ See generally, Comments of the Alliance for Communications Democracy; the City of Ann Arbor, Michigan; the City of Fort Worth, Texas; Montgomery County, Maryland; and Somerville Community Access Television, in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

⁴ See generally, Comments of the Alliance for Community Media and the Office of Communication of the United Church of Christ (collectively, the "PEG Access Coalition"), in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

⁵ See generally, Comments of Bell Atlantic, in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

⁶ See generally, Comments of the Pacific Telesis Group, Pacific Bell and Nevada Bell, in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

⁷ See generally, Comments of the National Cable Television Association, Inc., in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

Inc., and Jones Intercable, Inc. (collectively, the "Joint Parties")⁸ and US West Communications, Inc. ("US West")⁹. The City is disappointed that these commentators appear to see little or no furtherance of the public interest by providing preferential PEG access, and the City believes that these commentators' positions are not supported by the preponderance of evidence in this proceeding.

II. DISCUSSION

In its Comments, the City addressed the need for four essential modifications to the FCC's video dialtone regulations in order for those regulations to truly serve the public interest.¹⁰ These four considerations are echoed by a number of commentators as described in the following discussion.

A. The FCC Should Establish Preferential Access To Video Dialtone Systems For Public, Educational And Governmental (PEG) Programmers

A wide variety of commentators concur with the City's view that the Commission should establish preferential PEG access to video dialtone systems. Like the City, they believe that without preferential treatment, PEG programmers will not be able to successfully gain access

⁸ See generally, Comments of the Joint Parties -- Adelphia Communications Corp.; Comcast Cable Communications, Inc.; Cox Enterprises, Inc.; and Jones Intercable, Inc., in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

⁹ See generally, Comments of US West Communications, Inc., in Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, dated December 16, 1994.

¹⁰ City Comments at 3.

to the video dialtone platform.¹¹ As ACD, et al., states, "Because of the expense and the difficulty of producing video programming and of conveying it to the network, the Commission needs to foster enhanced opportunities for PEG access."¹² NATOA, et al., concurs stating, "It is likely that in the absence of such PEG requirements, the public will receive primarily commercial programming of national interest at the expense of local public programming in the local public interest, since many potential sources of local PEG programming do not otherwise have the resources or capability of providing programming over video dialtone systems if the channel capacity must be purchased."¹³

Similarly, commentors concur with the City that preferential access for PEG programmers would be a continuation of the sound federal public policy that has long sought to foster PEG channels and thus further the public interest and expand program diversity.¹⁴ For example, ACD, et al., quotes Congress's historic stance that "There can be no doubt that the purposes of access regulations serve a most significant and compelling governmental interest -- promotion of the basic underlying values of the First Amendment itself."¹⁵ Similarly, the PEG Access Coalition cites a recent Congressional report as affirming, "Community use of public, educational and governmental (PEG) access channels on cable systems has become a vital means of maintaining an informed and involved citizenry."¹⁶

¹¹ City Comments at 3.

¹² ACD, et al., Comments at 4.

¹³ NATOA, et al., Comments at 8.

¹⁴ City Comments at 3.

¹⁵ ACD, et al., Comments at 5 and Footnote 6.

¹⁶ PEG Access Coalition Comments at 12 and Footnote 21.

Industry commentators also support the fact that preferential PEG access is sound federal policy. Bell Atlantic states that such access "would further the substantial Federal interest in ensuring the continued viability and universal availability" of PEG and other local and public interest programming.¹⁷

Many industry, community, programmer and local government commentators also agree that PEG access programming is valuable to subscribers and inherently serves the public good.¹⁸ For example, Bell Atlantic indicates that "The universal availability of this popular, public interest programming benefits all end user subscribers."¹⁹ NATOA, et al., adds, "Congress' hope that PEG requirements on cable operators would stimulate a diversity and abundance of information is being realized. Hundreds of PEG channels on cable systems today provide communities with informational and educational programming as well as televise local government proceedings of city councils and planning boards and informational programming about local government services and departments to the public."²⁰ Further, the PEG Access Coalition provides affidavits from a number of PEG programmers clearly indicating that PEG channels serve the public good by providing "important community service, safety, educational and public health information. PEG access allows community groups to communicate with their members and with each other."²¹

The City has stated that it believes that preferential access for PEG programmers to

¹⁷ Bell Atlantic Comments at 10.

¹⁸ City Comments at 4.

¹⁹ Bell Atlantic Comments at 9.

²⁰ NATOA, et. al, Comments at 5-6.

²¹ PEG Access Coalition Comments at 7 and Appendix A.

video dialtone systems must be mandated by the FCC.²² Other local government, programmer and community commentators agree. ACD, et al., comments that "The Commission can, therefore, appropriately meet the needs of communications democracy by requiring video dialtone operators to ensure that facilities are available for PEG-type access to their systems."²³ NATOA, et al., concurs stating, "The Commission should not only require that video dialtone providers grant PEG programmers preferential access but that the Commission must establish a mechanism that ensures that PEG access channel capacity and transmission facilities are available, accessible and affordable to PEG programmers."²⁴

Regarding industry commentators, those that support preferential access for PEG programmers appear to support such access only if it is voluntary.²⁵ Other industry commentators sharply disagree with even voluntary carriage concepts. For example, the Joint Parties believe, "There are no circumstances under which preferential access can be granted."²⁶ NCTA concurs.²⁷

In response to industry opposition to preferential access proposals, the City first notes that a careful reading of the objections of the cable industry appears to indicate that its opposition is targeted at preferential access for commercial broadcasters and would thus seem to be a continuation of the historic battle between the broadcast industry and the cable

²² City Comments at 5.

²³ ACD, et al., Comments at 6.

²⁴ NATOA, et al., Comments at 7.

²⁵ Bell Atlantic Comments at 8; Pacific Comments at 8; and US West Comments at 28.

²⁶ Joint Parties Comments at 8.

²⁷ NCTA Comments at 20.

television industry, now fought in the context of this video dialtone proceeding. The City believes that the Commission must not let this historic commercial conflict cloud its perspective on preferential access for PEG programmers.

Second, what is troubling regarding certain telephone industry views on the concept of preferential PEG access is that where such support is given, it appears that it is only given with significant limitations and qualifications. For example, the City's likely first provider of video dialtone services, US West, uses one paragraph of its comments to provide qualified support for voluntary preferential carriage, but states elsewhere in nearly seven pages of testimony that it does not believe that preferential access or rates should be granted "to purveyors of content catering or held to be involving the Public, Educational and Government ("PEG")"²⁸; that it has "no interest in becoming involved in what would clearly be an administrative nightmare to determine 'who' is a legitimate 'non-commercial or non-profit' programmer or 'what' is PEG programming"²⁹; and that any mandated preferential PEG access would "force US West into a particular model for carrying speech which it does not currently want to pursue or endorse."³⁰ This lack of understanding of the importance of PEG programming to the City and its residents, as well as US West's unwillingness to participate in furthering the public interest by providing such programming, is extremely disappointing to the City and shows quite clearly that, left to its own devices, the telecommunications industry may not truly support PEG programming. As the PEG Access

²⁸ US West Comments at 22

²⁹ US West Comments at 24.

³⁰ US West Comments at 26.

Coalition correctly states, "Voluntary ad hoc arrangements are not reasonable guarantees of universal service as it relates to community access or meaningful democratic discourse."³¹

B. PEG Access Should Be At No Charge To The Programmer

Many respondents agree with the City that there is a compelling showing of need for the FCC to stipulate no-cost or low-cost access for PEG programmers to video dialtone systems.³² For example, NATOA, et al., states that "Governmental and educational entities should be granted preferential access at no charge. Preferential access for non-profit organizations also should be at no charge or at a rate not exceeding, if not lower than, the incremental cost to the LEC of providing channel capacity to such programmers."³³ On the industry side, Bell Atlantic states that it will provide capacity to PEG programmers at no charge.³⁴

Commentors agree with the City that PEG programmers typically have very tight operating budgets and thus will not have the ability to gain access to video dialtone systems with the same ease as commercial programmers.³⁵ For example, the PEG Access Coalition states that "more than 65 percent of access centers have yearly budgets of less than \$250,000; the majority of these centers rely primarily on volunteer help for their survival."³⁶

³¹ PEG Access Coalition Comments at 23.

³² City Comments at 5.

³³ NATOA, et al., Comments at 9.

³⁴ Bell Atlantic Comments at 8 and Footnote 17.

³⁵ City Comments at 5.

³⁶ PEG Access Coalition Comments at 5 and Footnote 6.

Additionally, commentors agree that PEG programmers may need more than just capacity to be viable on video dialtone systems. Consistent with the City's position, these commentors point to the cable television model which provides facilities, equipment and operational funding, in addition to capacity, as presenting a good framework for facilitating PEG access in a video dialtone environment.³⁷ For example, the PEG Access Coalition states that it supports "the concept of providing low-cost/no-cost access (and facilities, equipment and services to support it) to state and local governments and 501(c)(3) organizations in much the same way that PEG access is currently being provided subject to local franchise agreements and pursuant to Section 611 of the 1984 Cable Act."³⁸

For a variety of reasons, commentors also do not believe that preferential access for PEG programmers will create problematic economic distortions.³⁹ For example, the PEG Access Coalition concurs with the City that PEG access provisions apparently have in no way harmed the financial performance of the cable television industry.⁴⁰

C. Specific PEG Access Capacity Should Be Negotiated At The Local Level

In its comments in this proceeding, the City has stated that the FCC should empower local governments to negotiate specific PEG access capacity levels for their specific situations. A variety of commentors agree with this stance. For example, ACD, et al., states that "the Commission should create rules that enable LECs and communities to work

³⁷ City Comments at 5-6.

³⁸ PEG Access Coalition Comments at 6-7 and Footnote 12.

³⁹ City Comments at 6; and Bell Atlantic Comments at 9-10 and Footnotes 17 and 18.

⁴⁰ PEG Access Coalition Comments at 16.

together to develop the best solutions for a given area."⁴¹ On the industry side, Pacific states that it "is committed to working with cities, schools and community groups to develop innovative approaches to public, educational and government services."⁴² Commentors also believe that such access should not necessarily be limited to analog capacity. Again citing Pacific in its Comments, "The deployment of broadband networks will enable these groups to develop new services and applications that operate interactively, not just the traditional one-way analog broadcast format of traditional PEG channels."⁴³ It seems clear to the City that the preponderance of evidence and opinion is that specific PEG capacity and support issues should be determined at the local level, even though the Commission may set mandatory minimums to ensure that PEG programmers are able to gain access on every video dialtone system.

D. Preferential PEG Access To Video Dialtone System Capacity Is Sound Public Policy And Will Further The Public Interest

It appears to the City that opposition to preferential PEG access primarily comes from the cable television industry and some members of the telephone industry and is rooted in two flawed arguments -- first, that preferential PEG access will violate common carrier principles and regulations and, second, that such access will violate First Amendment rights.⁴⁴ The City believes, however, that the majority of commentors in this proceeding

⁴¹ ACD, et al., Comments at 7.

⁴² Pacific Comments at 8.

⁴³ Pacific Comments at 8-9.

⁴⁴ See generally, Joint Parties Comments at Section III; NCTA Comments at Section II; and US West Comments at Section IV.

have demonstrated effective cases and showings that invalidate these two arguments. For example, as detailed by the PEG Access Coalition, preferential PEG access to video dialtone systems is clearly permissible under common carrier principles and regulations as constituting just and reasonable discrimination.⁴⁵ ACD, et al., concurs and notes that common carrier law "specifically mentions government communications as one such just and reasonable classification."⁴⁶

It is equally clear that PEG access requirements are consistent with the First Amendment. As NATOA, et al., shows, recent federal court decisions have continued to hold that "PEG requirements were content-neutral and served a significant regulatory interest."⁴⁷ Additionally, as ACD, et al., points out, preferential PEG access serves to further a diversity of speech that is consistent with the underlying values of the First Amendment, and consequently does not in any way confound First Amendment freedoms.⁴⁸ Based on the weight of all the evidence presented in this proceeding, therefore, the City believes that it is not only the right of the Commission to establish broad PEG access to video dialtone systems, it is the Commission's public interest duty as well.

III. CONCLUSION

In summary, after review of a wide spectrum of local government, community and consumer group, PEG programmer and industry comments, the City finds a large body of

⁴⁵ PEG Access Coalition Comments at 15-16.

⁴⁶ ACD, et al., Comments at Footnote 8.


⁴⁷ NATOA, et al., Comments at Footnote 1.

⁴⁸ ACD, et al., Comments at 5.

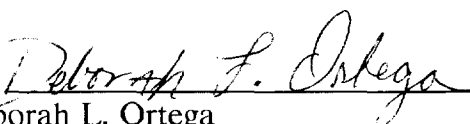
support for its initial contentions in this proceeding and thus re-emphasizes the four conclusions found in its Comments filed with the FCC on December 16, 1994. Accordingly, the City continues to believe, and the evidence shows, that the Commission's public interest and program diversity goals for video dialtone will not be met unless the FCC adheres to the following four principles and modifies its rules accordingly:

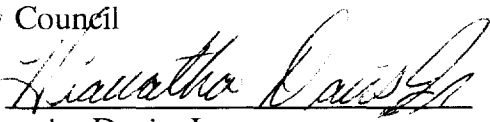
- Public, Educational and Governmental (PEG) programmers should have preferential access to video dialtone systems.
- PEG Access to the video dialtone system should be at no charge to the PEG programmer.
- PEG Access capacity should be negotiated at the local level.
- Preferential PEG Access is sound public policy and will further the public interest.

Respectfully Submitted,

By: 
Alonzo Matthews
Manager
General Services Administration

City and County of Denver
17th Floor
303 West Colfax
Denver, CO 80204

By: 
Deborah L. Ortega
President
City Council

By: 
Hiawatha Davis, Jr.
City Councilman and
Chair, Economic Development Committee

City and County of Denver
City and County Building
Denver, CO 80202

CERTIFICATE OF SERVICE

I, Penny May, Legislative Analyst for the Denver City Council, do hereby certify that a true and correct copy of the foregoing "Reply Comments of the City and County of Denver" was mailed first-class, postage prepaid, this 13th day of January, 1995 to the following:

Norman M. Sinel
Stephanie M. Phillipps
William E. Cook, Jr.
Counsel for the Local Governments
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Nicholas P. Miller
Joseph Van Eaton
Frederick E. Ellrod III
Attorneys for the Alliance for
Communications Democracy, et al.
Miller, Canfield, Paddock and Stone
1225 19th Street, N.W., Suite 400
Washington, D.C. 20036

Anthony L. Pharr, Esq.
Office of Communication
United Church of Christ
2000 M. Street, N.W.
Washington, D.C. 20036

Jeffrey S. Hops, Esq.
Director, Government Relations
Alliance for Community Media
666 11th Street, N.W., Suite 806
Washington, D.C. 20001

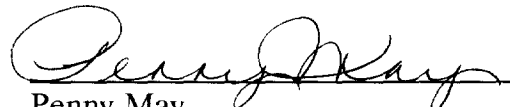
Michael E. Glover
Betsy L. Anderson
Attorneys for the Bell Atlantic Telephone
Companies
1710 H Street, N.W., 8th Floor
Washington, D.C. 20006

James P. Tuthill
Lucille M. Mates
Attorneys for the Pacific Telesis Group,
et al.
140 New Montgomery Street, Room 1526
San Francisco, California 94105

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Attorneys for the National Cable
Television Association, Inc.
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Leonard J. Kennedy
Peter H. Feinberg
Michael S. Schooler
Steven F. Morris
Attorneys for the Joint Parties
Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W., Suite 500
Washington, D.C. 20037

Robert R. McKenna
Attorney for US West Communications, Inc.
1020 19th Street, N.W., Suite 700
Washington, D.C. 20036



Penny May